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No. 03-6821

IN THE

Supreme Court of the United States

DAVID LARRY NELSON,

Petitioner,

vs.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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QUESTION PRESENTED

Whether a complaint brought under 42 U. S. C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U. S. C. § 2254.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In 1996, Congress enacted a landmark reform of the law of habeas corpus, the Antiterrorism and Effective Death Penalty Act of 1996, to curb the rampant abuses that had occurred up to

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

that time, particularly in capital cases. Petitioner in this case seeks to evade the limitations imposed by Congress merely by captioning his pleading as a civil rights complaint instead of a habeas petition. Such evasion is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Petitioner David Nelson is sentenced to death for his third murder.

> "On August 28, 1974, David Larry Nelson, the appellant, pleaded guilty to murder in the second degree for the murder of Oliver King. The Circuit Court of Jefferson County, Alabama, sentenced Nelson to twelve years imprisonment.
>
> "In 1977, after serving six years of the twelve-year sentence, including pretrial time, Alabama prison officials released Nelson. On December 31, 1977, Nelson murdered James Dewey Cash during the course of a robbery. *Nelson v. State*, 452 So. 2d 1367 (Ala. Crim. App. 1984). A few hours later, on January 1, 1978, Nelson murdered Wilson W. Thompson. The facts of the Thompson murder are set forth in *Nelson v. State*, 511 So. 2d 225 (Ala. Crim. App. 1986)." *Nelson* v. *Nagle*, 995 F. 2d 1549, 1551 (CA11 1993) (*per curiam*).

Nelson has been sentenced to death three times for murdering Mr. Thompson. See *Nelson* v. *Alabama*, 292 F. 3d 1291, 1293-1294 (CA11 2002).

Effective July 1, 2002, the State of Alabama changed its method of execution from electrocution to lethal injection. Previously sentenced inmates had until 30 days from that date to elect electrocution rather than injection. Ala. Code § 15-18-82.1(b). Petitioner did not make this election. See Brief for Petitioner 5, n. 3.

On September 3, 2003, the Alabama Supreme Court set an execution date of October 9, 2003. Brief for Petitioner 5. At about that time, petitioner and his counsel became aware that the state might find it necessary to use a surgical procedure to gain access to a vein for the lethal injection.

On October 6, 2003, three days before the scheduled execution, Nelson filed a civil rights suit under 42 U. S. C. § 1983 in the United States District Court for the Middle District of Alabama. J. A. 5-23. The complaint alleged that the state's actions and proposed actions violated both state law and the Eighth Amendment. J. A. 21. The complaint did *not* allege that either claim had ever been presented to any state court or that state remedies were absent or ineffective. See also J. A. 102-103 (amended complaint).

The District Court granted the defendants' motion to dismiss the next day. J. A. 116-117. The Court of Appeals affirmed, finding that the complaint was the functional equivalent of a habeas petition and did not meet the requirements for a successive petition under 28 U. S. C. § 2244(b)(2). J. A. 121. On October 9, the Court of Appeals denied rehearing en banc. J. A. 129-130.

The same day, *i.e.*, the day scheduled for the execution, Nelson filed two motions with the Alabama Supreme Court. One was titled "Motions to Require Medically Acceptable and Constitutional Procedure Prior to Execution." This motion is reproduced in Appendix A to this brief, except that most of Part II, the Statement of Facts, is omitted. The statement is largely the same as the federal court complaint. The other motion was for stay of execution.

Also on October 9, Nelson filed with this Court a petition for writ of certiorari to the Eleventh Circuit and an application for stay. The application for stay was granted. J. A. 131. The Alabama Supreme Court then denied the motion for stay before it as moot, and it simply denied the substantive motion. This order is reproduced as Appendix B to this brief. This Court

granted certiorari on December 1, 2003, restating the question presented. J. A. 132-133.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1871, now codified at 42 U. S. C. § 1983, may not be used to circumvent the limitations placed on habeas corpus by the Congress and by this Court's precedents. *Preiser* v. *Rodriguez* settled that when the relief sought is within the scope of habeas corpus, that procedure is exclusive. If the limitations placed on habeas preclude relief, § 1983 cannot be used to obtain what Congress has decided to deny.

Shorthand references in noncapital cases to the scope of habeas as "the fact and duration of confinement" are not controlling. The underlying principle is that the habeas remedy is exclusive for claims within its scope. Habeas is well established as the proper procedure for penalty phase and method of execution claims going back over a century, even though neither type of claim seeks to shorten the duration of confinement.

In addition, under the doctrine of *Younger* v. *Harris*, § 1983 may not be used to interfere with the execution of a state judgment unless state remedies for a constitutional violation are absent or ineffective. Where state law on the existence of remedies is unclear, the complaining party must ask the state courts first. Nelson did not do so, and his complaint was subject to dismissal under *Younger*.

Recharacterization of pleadings is an irregular but necessary practice in cases with *pro se* litigants. It should never be done in the case of a represented party. All of the reasons for recharacterizing pleadings can be met as well by giving counsel leave to amend, in circumstances where the governing rules and statutes permit amendment. If counsel will not amend an improper pleading, or if the governing law does not permit amendment, it should be dismissed.

In the present case, the § 1983 complaint could not have been saved by amending it to a habeas petition. The requirement of exhaustion of state remedies had not been met. The complaint was properly dismissed.

ARGUMENT

I. The Civil Rights Act may not be used to circumvent Congress's limits on habeas corpus.

A. The Specific and the General.

This case brings the Court once again to the well-traveled intersection between the Civil Rights Act of 1871, 42 U. S. C. § 1983, and the federal habeas corpus statute for state prisoners, 28 U. S. C. § 2254. See *Heck* v. *Humphrey*, 512 U. S. 477, 480 (1994); *Preiser* v. *Rodriguez*, 411 U. S. 475, 482-483 (1973). The rule of the road is well established that habeas corpus, as the more specific of the two, has the right-of-way at this crossing, *i.e.*, it "must be understood to be the exclusive remedy available in a situation like this where it so clearly applies." *Preiser*, *supra*, at 489. Little more than reaffirmation of this principle is needed to answer the question presented in this case.

Federal court litigation by state-court criminal defendants has long raised delicate questions of federalism. See, *e.g.*, *Ex parte Royall*, 117 U. S. 241, 252 (1886) (habeas); *Fenner* v. *Boykin*, 271 U. S. 240, 244 (1926) (civil rights); *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1951) ("special delicacy"). Both the habeas statute and the Civil Rights Act require striking a balance between the need to protect federal rights from state action and the need to avoid undue interference in the state's administration of its own laws. For the Civil Rights Act, these needs are accommodated through several doctrines of "abstention," the most important of which is discussed further in Part II, *infra*. However, the problem has received more attention both from this Court and from the Congress in the area of

habeas corpus, because federalism is implicated in every § 2254 case, not just occasionally as it is in § 1983 litigation. This greater attention has resulted in a more developed body of law, with a finely crafted set of rules defining the limits of federal court action. Particularly where Congress has balanced the interests and defined the limits, courts and litigants must not be permitted to evade those limits and upset that balance simply by attaching a different label. See, *e.g.*, *Calderon* v. *Thompson*, 523 U. S. 538, 553 (1998) (successive petition limits apply to motion to recall mandate, to preclude evasion).

The plaintiffs in *Preiser* had lost good time credits in prison discipline proceedings and sought to challenge those proceedings in Federal District Court in § 1983 actions, combined with habeas corpus petitions. See 411 U. S., at 476-482. The relief they sought was release from confinement. See *id.*, at 487. Court of Appeals panels in two of the three cases held that the cases were habeas petitions, not civil rights actions, and as such had to be dismissed for nonexhaustion. See *id.*, at 479-480. These decisions were reversed en banc. See *id.*, at 482. This Court reversed in turn.

Preiser discusses the scope of habeas corpus and the relief available under it as that procedure had evolved through the time of the decision, not just the very limited review of jurisdiction of the committing court available in the early 1800s. See *id.*, at 484-486. "In the case before us, the respondents' suits in the District Court fell squarely within this traditional scope of habeas corpus." *Id.*, at 487. If they succeeded, they would be released from custody earlier, the relief typically available in habeas. Again, the word "traditional" in this passage includes modern expansions of the scope of habeas. See *id.*, at 487-488. The *Preiser* Court rejected the position of the dissent that the Civil Rights Act should reach wherever habeas relief would not have been available in times past. See *id.*, at 488, n. 8.

The broad language of the Civil Rights Act, applicable to the case on its face, was not conclusive. *Preiser* held that the Civil Rights Act could not be used where the subject matter of

the suit was so clearly within the scope of "the *specific* federal habeas corpus statute." *Id.*, at 489 (emphasis added). This conclusion was based squarely on the need to prevent evasion of congressional limits on habeas, of which exhaustion was the most important at that time. "It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings." *Id.*, at 489-490. Although *Preiser* speaks in terms of the exhaustion requirement and attacks on the fact and length of confinement, its underlying principle is somewhat broader. If the relief sought is the type of relief for which Congress has provided habeas corpus, then the Civil Rights Act must not be used to evade the limitations that Congress has placed on habeas and upset the balance that Congress has struck. It is no answer to say that this particular plaintiff cannot actually obtain relief on habeas. The *Preiser* plaintiffs could not, because they had failed to exhaust state remedies. If Congress has decided that habeas relief should not extend to a prisoner in the petitioner's circumstances, that is precisely the policy determination that the courts must respect and not evade through the Civil Rights Act. See *id.*, at 490.

The rule of *Preiser* that the specific statute, with its limitations, controls in the area where the specific and general statutes overlap is simply one application of a well-established principle. *Brown* v. *GSA*, 425 U. S. 820 (1976) illustrates the breadth of this principle. Congress had provided a remedy for discrimination claims by federal employees in 42 U. S. C. § 2000e-16. The plaintiff missed the deadline for judicial review of the administrative determination of his claim, and he tried to evade that requirement by invoking the general employment discrimination statute. See 425 U. S., at 823-824. Quoting *Preiser*, *Brown* held that the balance struck by Congress could not be evaded merely by attaching a different label. *Id.*, at 832-833. "It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful

pleading." *Id.*, at 833. "In a variety of contexts the Court has held that a precisely drawn, detailed statute preempts more general remedies." *Id.*, at 834 (citing cases on Federal Tort Claims Act, Suits in Admiralty Act, and venue requirements in patent cases).[2] A specific remedy may be cumulative rather than exclusive when the language or history of the statute indicates that intent, see *id.*, at 833-834, but neither the habeas statute in *Preiser* nor the employment statute in *Brown* fell in that category. See *id.*, at 835. In each case, the specific remedy was exclusive, and the plaintiff could not invoke the general one, even though the specific one was no longer available to him. See *id.*, at 835.

B. Habeas and Method of Execution.

Under *Preiser*, the threshold question in determining whether a § 1983 action is cognizable is simply one of whether the claim lies within the scope of habeas corpus. Although the use of habeas to litigate method of execution claims "may lack a perfect historical pedigree," cf. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) (cause and prejudice test for procedural default), it is well established at this point. In the usual habeas case, the prisoner is contending that he should not have been convicted at all, and hence should not have been imprisoned at all, or else that his sentence of incarceration is too long and he should be released sooner. Hence, the dispute is typically stated as a challenge to the fact or duration of confinement. See, *e.g.*, *Porter* v. *Nussle*, 534 U. S. 516, 527 (2002); see also *Muhammad* v. *Close*, 540 U. S. __ (No. 02-9065, Feb. 25, 2004) (slip

2. *Heck* v. *Humphrey*, 512 U. S. 477 (1994) and *Edwards* v. *Balisok*, 520 U. S. 641 (1997) extended *Preiser* to situations where a plaintiff did not seek a form of relief cognizable in habeas corpus, but sought money damages on a theory that implied invalidity of the conviction or loss of good-time credits. These cases are only tangential, as is *Muhammad* v. *Close*, 540 U. S. __ (No. 02-9065, Feb. 25, 2004), while *Preiser* is on point, for reasons which we understand will be discussed in the Respondent's Brief and need not be repeated here.

op., at 1) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . . "). In challenges to the penalty phase of a capital case, the prisoner is contending that he *should* have been sentenced to life in prison, and so in a sense it is the prisoner who is arguing for a *longer* confinement than the state wishes to impose. Even so, penalty phase claims have been routinely reviewed on habeas throughout the modern capital punishment era. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 695 (1984). Congress enacted its most recent reforms of habeas corpus with capital cases as its central focus, see 141 Cong. Rec. 15,018 (1995) (statement of Sen. Specter), and it did not eliminate the penalty phase litigation, so it must have intended that this practice continue.

Review of method of execution on habeas goes back at least to *In re Kemmler*, 136 U. S. 436 (1890), an Eighth Amendment challenge to electrocution. The Court denied an application for writ of error because the decision below was "so plainly right," *i.e.*, on the merits, without any hint that habeas was an incorrect procedure. *Kemmler* arose on state habeas, so the Court would not necessarily have commented on the procedure if the state courts did not, but the same year the Court denied federal habeas on the same ground in *Jugiro* v. *Brush*, 140 U. S. 686 (1890). The Court summarily affirmed by citing *Kemmler*, a merits decision. In the modern era, *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 653 (1992) (*per curiam*) clearly contemplates that habeas is available for a method of execution claim, and at least hinting if not holding that habeas is the exclusive remedy. In *Stewart* v. *LaGrand*, 526 U. S. 115 (1999) (*per curiam*), a method of execution claim was decided on habeas on the basis of well-established habeas doctrine, with no question of the applicability of the procedure. See *id.*, at 119 (citing *Teague* v. *Lane*, 489 U. S. 288 (1989) and *Coleman* v. *Thompson*, 501 U. S. 750 (1991)). Of course, the unexplained and unchallenged exercise of jurisdiction does not form a precedent which is binding in a case where the question is squarely presented, see *Lewis* v.

Casey, 518 U. S. 343, 352, n. 2 (1996), but the long and unbroken history of the exercise of this jurisdiction does at least illustrate that method of execution claims are established and accepted as being within the scope of habeas corpus.

As *Preiser* and *Brown* illustrate, the dispositive question is whether claims of this type are within the scope of the more specific remedy, not whether this particular plaintiff can actually obtain relief or even a decision on the merits. Challenges to the method of execution are within the scope of habeas corpus, and the question of whether Nelson can receive a federal court determination of the merits of his claim therefore depends on the interpretation of the federal habeas statute. As discussed further in Part III, *infra*, the answer to the question presented in this case does not depend on the answer to the successive petition riddle.

II. The Civil Rights Act cannot be used to interfere with ongoing state-court proceedings, except in rare cases.

Aside from the exclusivity of the habeas remedy, there is a second, independent reason why 42 U. S. C. § 1983 cannot be used in this case. With rare exceptions, § 1983 cannot be used to interfere with ongoing state-court proceedings, under the rule commonly known as the *Younger* abstention doctrine. "[O]ur cases . . . repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger* v. *Harris*, 401 U. S. 37, 45 (1971).

In *Heck* v. *Humphrey*, 512 U. S. 477, 480 (1994), the Court noted, "In general, exhaustion of state remedies 'is *not* a prerequisite to an action under § 1983,' *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 501 (1982) (emphasis added) . . . ." The qualifier "in general" is a significant modification of the actual language of *Patsy*, which said "categorically." In cases subject to the *Younger* doctrine, there *is* an exhaustion requirement.

The doctrine now called *Younger* actually goes back at least as far as *Fenner* v. *Boykin*, 271 U. S. 240 (1926). See *Younger*, 401 U. S., at 45 (quoting *Fenner*). The *Fenner* plaintiffs asked for an injunction against a threatened state prosecution for the crime of trading commodities futures, asserting that the statute was unconstitutional. See *Fenner*, *supra*, at 242-243. The Court noted that under *Ex parte Young*, 209 U. S. 123 (1908), the federal court had the power to do so. "But this may not be done except under extraordinary circumstances . . . . The accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that this course would not afford adequate protection." 271 U. S., at 243-244. In modern parlance, he must exhaust state remedies.

In *Fenner* the state proceedings were merely threatened, not yet commenced. *Younger* dealt with a situation where "a proceeding was already pending in the state court," 401 U. S., at 49, which calls for even greater restraint. Compare *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974) (declaratory relief available for threatened prosecution), with *Samuels* v. *Mackell*, 401 U. S. 66, 73-74 (1971) (not available for pending state prosecution). The key questions under *Younger* are whether a state proceeding is pending and whether the plaintiff has qualified for an exception.

Huffman v. *Pursue, Ltd.*, 420 U. S. 592 (1975) addressed the application of *Younger* to an injunction against enforcement of a judgment after the state-court trial. The local authorities had brought a nuisance action in state court and obtained a judgment closing the defendant's pornographic theater for a year. *Id.*, at 595-598. Defendants did not appeal. *Id.*, at 598. The Federal District Court enjoined execution of the closure order in part. *Id.*, at 599.

This Court rejected the argument that *Younger* did not apply because the state-court judgment was final, and hence no proceeding was pending. "[A] necessary concomitant of *Younger* is that a party in appellee's posture *must exhaust* his state appellate remedies before seeking relief in the District

Court, unless he can bring himself within one of the exceptions specified in *Younger*." *Id.*, at 608 (emphasis added).

Juidice v. *Vail*, 430 U. S. 327 (1977) is procedurally quite similar to the present case. Vail did not challenge the validity of the underlying money judgment against him, but rather attacked the constitutionality of using contempt orders to enforce such judgments. He made this claim in a § 1983 action without ever raising it in any state court. See *id.*, at 330. "Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention." *Id.*, at 337 (emphasis in original, footnote omitted).

Under *Huffman* and *Juidice*, then, *Younger* is not strictly limited to "pending" state proceedings in the narrow sense. References to a distinction between pending and non-pending cases must be understood in the context of the *Samuels/Steffel* distinction between cases that have *begun* and those that have not. *Younger* applies to any federal court interference with a state court case after its commencement, including interference with the execution of the judgment when no further appeals are available.

The present case is even more straightforward than *Huffman* and *Juidice*, because there was a pending state proceeding in the usual sense. In the present case, the actual execution date was set by order of the Alabama Supreme Court. See Brief for Petitioner 5. When an objection to the method of execution arises after the trial and appeal, the "most propitious" forum for making the objection is the court setting the execution date. Cf. *Juidice*, 430 U. S., at 337, n. 14.

Nelson did, in fact, file such an objection in the Alabama Supreme Court, but only after both the Federal District Court and the Court of Appeals had ruled against him on the § 1983 action. On October 9, 2003, Nelson filed two motions, one for a stay of execution and one titled "Motion to Require Medically Acceptable and Constitutional Procedure Prior to Execution."

The latter pleading is reproduced in part in Appendix A. The factual allegations are omitted, because they are substantially the same as those made in the federal court.

This motion is clearly made in the context of an ongoing proceeding, not the initiation of a new case. In both caption and text, the State is referred to as the "Movant" while Nelson is the "Respondent." The case number is the same as the direct appeal. See *Nelson* v. *State*, 681 So. 2d 252, 252, n. * (Ala. Crim. App. 1995); *In re Nelson*, 681 So. 2d 260 (Ala. 1996).

The Alabama Supreme Court's disposition of the motions is reproduced in Appendix B. It presents the interpretational difficulties common to summary dispositions, cf. *Coleman* v. *Thompson*, 501 U. S. 722, 727, 744 (1991), but it does seem to imply that Nelson's motion was procedurally proper, although substantively without merit. The court denied the motion for stay as moot after this Court's stay and grant of certiorari prevented execution on the date scheduled. The substantive motion is simply denied, with no indication it was procedurally improper.

Despite Nelson's evident belief in the procedural propriety of this motion, the Eighth Amendment is conspicuously absent from it. Nelson asked the Alabama Supreme Court to forbid the procedure in question on the ground that it "violates the prohibition against the infliction of cruel and unusual punishments in violation of Article I, Section 15 of the Constitution of the State of Alabama." *Infra*, at A-2. For whatever reason, Nelson has made a deliberate choice *not* to present his federal claim to an available state forum in which the proceeding was pending. *Juidice* holds quite expressly that this is sufficient to preclude his § 1983 action under *Younger*, unless an exception applies.

"*Younger* v. *Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by

a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973). Thus, the federal suit may proceed if the state tribunal is "incompetent by reason of bias to adjudicate the issues pending before it." *Ibid.* This exception does not apply, however, if the party merely believes that the state court is a less hospitable forum. See *Huffman*, 420 U. S., at 610-611.

The "timely decided" aspect raises a potentially thorny problem in capital cases. On the one hand, a state court which refused to grant a stay to consider a potentially meritorious claim unavoidably raised late in the proceedings would not be providing the opportunity that *Younger* envisions. On the other hand, state courts as well as federal should emphatically reject the cynical manipulations all too often employed by capital defense counsel, as exemplified in the Robert Alton Harris execution at issue in *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992). In that case, a challenge to the standard method of execution which had been in use for decades was deliberately withheld through multiple rounds of litigation, including an appeal, nine state habeas petitions, and four federal habeas petitions, only to be filed in a civil rights suit a few days before the scheduled execution. See *id.*, at 653 (four prior federal habeas); Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 322 (1992) (chronology, noting nine state habeas petitions, execution date set for April 21, 1992, civil rights suit filed April 17). "There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Gomez*, *supra*, at 654. Congress was keenly aware of the Harris case when it enacted the Antiterrorism and Effective Death Penalty Act of 1996. The bill's supporters cited the case repeatedly as an example of the abuse they intended to stop. See, *e.g.*, 141 Cong. Rec. 14,734 (1995) (statement of Sen. Feinstein); *id.*, at 15,019 (statement of Sen. Specter).

A state court remedy is not ineffective or unavailable if the court denies a stay on the same basis that this Court vacated the stay in *Gomez*. The precise boundary need not be drawn in the present case, because Nelson never presented his federal claim to the state courts at all, not even in the motion filed *on* the execution date.

The issue of unavailability of a stay as a ground for the inadequacy exception to *Younger* was presented in *Pennzoil Co.* v. *Texaco, Inc.*, 481 U. S. 1 (1987). The Texas state courts had rendered a large money judgment against Texaco, and the appeal statute required a bond for a stay pending appeal. As applied to the case, the bond requirement was impossible. See *id.*, at 4-5. Without ever presenting a federal claim to the state courts, Texaco filed a § 1983 action to enjoin enforcement of the judgment. *Id.*, at 6.

This Court held that *Younger* abstention was required. The would-be federal plaintiff cannot simply assume that the state courts would not grant relief "within the limited time available" in the unusual circumstances of the case. "[T]he burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.' " *Id.*, at 14 (quoting *Moore* v. *Sims*, 442 U. S. 415, 432 (1979)).

Of course, a showing by citation of precedents may not be possible if there is no precedent on point and state law is unclear. The clear alternative in cases of unclear state law is simply to ask the state court first, and to do so as far in advance of the execution date as possible. "We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims." *Id.*, at 15. Failure to do so in the absence of good cause is a species of procedural default. "Accordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Ibid.*

The *Younger* doctrine and the habeas corpus statute are substantially the same on this point. Exhaustion of state remedies is generally required, but it is excused if those remedies are absent or ineffective. See 28 U. S. C. § 2254(b)(1)(B). Regardless of whether this case is a habeas case or a § 1983 action, Nelson has neither exhausted state remedies nor carried his burden of showing they are inadequate or ineffective. Whatever it is called, the case was correctly dismissed.

III. Pleadings of represented parties should never be recharacterized, and especially not when relief cannot be granted.

The question presented in this case, as framed by the Court, is whether an execution procedure challenge filed under 42 U. S. C. § 1983 "is properly recharacterized as a habeas corpus petition under 28 U. S. C. § 2254." See *supra*, at i. *Amicus* CJLF submits that an improper pleading by a *represented* party should never be recharacterized by the court. If counsel cannot or will not amend it, it should be dismissed.

The Court has already addressed recharacterization once this term, in *Castro* v. *United States*, 540 U. S. __ (No. 02-6683, Dec. 15, 2003). *Castro* involved a federal prisoner and a pleading recharacterized as a motion under 28 U. S. C. § 2255, but for this purpose there is no difference between § 2255 and federal habeas petitions by state prisoners. Justice Scalia, concurring in part and concurring in the judgment, was leery of recharacterization as a "departure from our traditional adversarial principles." *Castro*, *supra* (slip op., at 3). The majority notes that it is "longstanding practice," *id.* (slip op., at 1), but only for *pro se* prisoners.

No death row prisoner need ever appear *pro se* in federal habeas. See 21 U. S. C. § 848(q)(4)(B). The special latitude for *pro se* habeas petitions that is the source of the recharacterization practice, see *Castro*, *supra* (slip op., at 2)

(opinion of Scalia, J.), is therefore inapplicable. It certainly does not apply to the present case. Petitioner Nelson was at all relevant times represented by counsel. See Brief for Petitioner 5-9.

A recharacterization is, in essence, an amendment of the party's pleading by the court. Amendment of pleadings is governed by Federal Rule of Civil Procedure 15 in both civil cases and habeas corpus. See 28 U. S. C. § 2242. That rule provides for parties to amend their own pleadings. Leave of the court or consent of the adverse party is sometimes required, Fed. Rule Civ. Proc. 15(a), but there is no provision for the court itself to amend the pleading. The normal mode of dealing with a fatally defective pleading is to dismiss it. See, *e.g.*, *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 31 (1989). In some cases, dismissal may be with leave to amend. See, *e.g.*, *Denton* v. *Hernandez*, 504 U. S. 25, 34 (1992).

Castro gives three reasons for recharacterizing the pleading of a *pro se* litigant: "to avoid an unnecessary dismissal, . . . , to avoid inappropriately stringent application of formal labeling requirements, . . . , or to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis." Slip op., at 6. For represented litigants, each of these purposes is accomplished just as well by granting leave to amend where the applicable rules and statutes allow it. Where they do not, it is because Congress has made a policy choice not to allow it, a choice which a court ought not circumvent by doing itself what the law does not allow the party to do. Cf. *Calderon* v. *Thompson*, 523 U. S. 538, 553 (1998).

For the reasons explained in Part II, *supra*, Nelson's § 1983 complaint violated the rule of *Younger* v. *Harris*, 401 U. S. 37 (1971). The case law is quite clear that a complaint which runs afoul of *Younger* must be dismissed. See *Edwards* v. *Balisok*, 520 U. S. 641, 649 (1997).

For the reasons explained in Part I, *supra*, the complaint is also contrary to the rule of *Preiser* v. *Rodriguez*, 411 U. S. 475

(1973). In some circumstances, it may be proper to allow the represented party to avoid dismissal under *Preiser* by amending the complaint to transform it into a habeas petition. This is not such a case.

In *Castro*, Justice Scalia noted that a *pro se* litigant's pleading should not be recharacterized "when there is nothing whatever to be gained by the recharacterization." Slip op., at 4 (emphasis omitted). That is the case here. At least one of the requirements for habeas relief is glaringly absent: exhaustion of state remedies. Not only did Nelson make no effort to give the state courts the first opportunity to address his federal claim, as federal law has long required, see *Preiser*, 411 U. S., at 490-492, he deliberately withheld the federal claim from the pleading that he did file in state court. See Appendix A.

Having made no attempt to exhaust state remedies, and having made no showing that state remedies were absent or ineffective, Nelson is categorically barred from relief on the merits in habeas corpus. See 28 U. S. C. § 2254(b)(1). Nelson is in the same position as Katzoff in the *Preiser* case, whose complaint the Court of Appeals panel correctly held should have been dismissed. See 411 U. S., at 480-481. Recharacterization and leave to amend would be equally pointless when the statute forbids relief.

The parties debate whether a habeas petition would be barred as successive, offering differing interpretations of *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998). The answer to the question presented does not depend on the resolution of that debate. Because the § 1983 action is precluded by both *Preiser* and *Younger*, and habeas relief is precluded by the exhaustion rule, dismissal of the action was the correct response, whether the reason given for it was correct or not.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

March, 2004

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

No. 1860528

SUPREME COURT OF ALABAMA

State of Alabama,
Movant

v.

David Larry Nelson,
Respondent.

MOTION TO REQUIRE MEDICALLY ACCEPTABLE AND CONSTITUTIONAL PROCEDURE PRIOR TO EXECUTION

Michael Kennedy McIntyre*
Georgia State Bar No. 494075
507 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 688-0900

H. Victoria Smith
Georgia State Bar No. 658605
507 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 688-0900

*Lead Counsel

MOTION FOR EXTRAORDINARY RELIEF OF POSTPONEMENT OF EXECUTION

Now comes, Respondent David Larry Nelson, by and through undersigned counsel, who hereby moves this Court to require the State follow a medically acceptable and constitutional procedure prior to the execution of David Larry Nelson and shows the following:

I. INTRODUCTION

The Respondent is scheduled to be executed by lethal injection at 6:00 p.m. on October 9, 2003 at William C. Holman Correctional Institute in Atmore, Alabama. As the Movant has conceded, due to the Respondent's severely compromised veins, the Movant will have to perform a medical procedure as a predicate to the legal procedure of execution by lethal injection in order to gain venous access. (Paragraph 2 of the Affidavit of Grantt Culliver, attached hereto as Attachment 1). Although the Movant refuses to release any written protocol promulgated by the State of Alabama regarding the procedures to be followed in performing this medical procedure and/or the qualifications of the person(s) responsible for performing this medical procedure, the Movant has provided the Respondent with a crude description of the procedure it intends to follow.

The medical procedure that the Movant intends to perform on the Respondent as a predicate to the legal procedure of execution by lethal injection is an outdated, barbaric method that does not comport with contemporary medical care standards and that violates the prohibition against the infliction of cruel and unusual punishments in violation of Article I, Section 15 of the Constitution of the State of Alabama. *See Hocker v. State*, 840 So.2d 197 (Ala.Crim.App. 2002).

The Movant has been informed of the substantial risks of inflicting unnecessary and wanton pain, if not torturous death, with the implementation of its chosen outdated method of gaining venous access, particularly given the fact that it will be

performed in a non-medical setting where proper drugs and proper medical equipment are not readily accessible. The Movant furthermore has been informed of a more modern, alternative medical procedure for gaining venous access that has supplanted the Movant's chosen outdated method, that comports with contemporary medical standards of care, and that does not violate the prohibition against cruel and unusual punishments. However, the Movant continues to show deliberate indifference to the known substantial risks.

As is set forth below, the relief sought is appropriate given the procedure the Movant intends to utilize prior to the Respondent's execution. As is more fully described below, there does exist a humane medical procedure to gain venous access to the Respondent that does not run afoul of the prohibition against cruel and unusual punishment under the Constitution of the State of Alabama.

It should be emphasized that the Respondent is not challenging his conviction or sentence of execution by lethal injection. Rather, he only seeks the relief of postponement of the legal procedure of execution by lethal injection until the Movant establishes by way of a written protocol that it will employ a humane medical procedure to gain venous access as a predicate to the legal procedure of execution by lethal injection that complies with Article I, Section 15 of the Constitution of the State of Alabama.

II. STATEMENT OF FACTS

[Part II omitted, except for last paragraph.]

Failure to provide relief will result in irreparable harm in that the Movant will perform the above-described cut-down procedure on the Respondent prior to his execution which is scheduled for 6:00 p.m. Central Time on October 9, 2003. Since the Respondent has been informed that he will be allowed to receive visitors only until 4:00 p.m. Central Time on October 9, 2003, the Respondent believes that the Movant may perform

the medical procedure that violates the Respondent's rights as guaranteed by Article I, Section 15 of the Constitution of the State of Alabama as early as 4:01 p.m. Central Time on October 9, 2003.

III. RELIEF SOUGHT

Wherefore, the Respondent seeks that this Court enter an Order which requires a medically acceptable and constitutional procedure prior to the Movant's execution which is currently scheduled at 6:00 p.m. Central Time on October 9, 2003. The Respondent believes that the Movant may perform the medical procedure that violates his rights as early as 4:01 p.m Central Time. As such, the Respondent respectfully requests that this Court enter its Order by prior to 4:00 p.m. Central Time on October 9, 2003.

Respectfully submitted,

MICHAEL KENNEDY McINTYRE
Georgia State Bar No. 494075
507 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 688-0900

H. VICTORIA SMITH
Georgia State Bar No. 658605
507 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 688-0900

IN THE SUPREME COURT OF ALABAMA
October 9, 2003

1860528

Ex parte David Larry Nelson. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(In re: David Larry Nelson v. State of Alabama)
(Jefferson Circuit Court: CC-78-1115; Criminal Appeals: 6/892, CR-93-2095).

ORDER

The petitioner, David Larry Nelson, having filed a motion for stay of execution and a "motion to require medically acceptable and constitutional procedure prior to execution" in this case, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the motion for stay of execution is denied as moot.

Houston, See, Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

IT IS FURTHER ORDERED that the "motion to require medically acceptable and constitutional procedure prior to execution" is denied.

Houston, See, Lyons, Brown, Harwood, Woodall, and Stuart, JJ., concur.